SUPREME COURT, U. S.

FILED

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IN THE

# Supreme Court of the United States

October Term, 1968
No. 699

ROBERT S. DALY,

*Petitioner,*

*vs.*

PEOPLE OF THE STATE OF CALIFORNIA,

*Respondent.*

## PETITION FOR REHEARING.

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## PETITION FOR REHEARING.

Petitioner prays that this Court grant rehearing of its order of March 24, 1969 denying the petition for a writ of certiorari, and that a Writ of Certiorari issue to review the judgment of the Appellate Department of the Superior Court of the State of California for the County of Santa Clara, entered in the above entitled case on July 3, 1968, as prayed for in the Petition filed October 28, 1968 herein.

### Reasons for Granting Rehearing and Issuing the Writ.

1. There are two grounds upon which this Petition for Rehearing are based, which are confined to intervening circumstances of substantial effect and which are available to petitioner, not previously presented. The questions now presented arise because of the Court's refusal to grant review in a case in which a book-

seller has been subjected to a harsh and cruel sentence of imprisonment for one year, together with a substantial fine and three years probation, under a state obscenity statute which as construed and applied to petitioner is clearly unconstitutional under the decisions of this Court.

The grounds for this Petition for Rehearing are:

(a) As a result of this Court's denial of a petition for a writ of certiorari, the petitioner has been subjected to an unforseeable and retroactive judicial enlargement of the state obscenity statute, contrary to the Due Process Clause of the Fourteenth Amendment. This retroactive judicial expansion of the state obscenity statute renders the statute vague and overbroad and contrary to the free speech and press provisions of the First Amendment subsumed into the Due Process Clause of the Fourteenth Amendment as a limitation upon state action.

(b) As a result of this Court's denial of a petition for a writ of certiorari, the standards and criteria for judging obscenity as enunciated by this Court in *Roth, Jacobellis, Memoirs* and *Redrup* have become so vague, ambiguous and overbroad as to deprive this petitioner and the community generally to access to constitutionally protected material, and subjected all persons engaged in the publication, distribution or circulation of books, magazines and other media of communication to pervasive censorship and criminal prosecutions without ascertainable standards of guilt.

2. Among the questions presented to this Court were, first, whether the state obscenity statute, as construed and applied by the courts below to authorize con-

viction of petitioner upon the ground that each of the books involved were obscene and not entitled to constitutional protection, abridged the exercise of freedoms of speech and press contrary to the free speech and press provisions of the First Amendment and the due process provisions of the Fourteenth Amendment; and, second, whether the statute, as construed and applied to authorize the conviction of petitioner without proof that petitioner knew the contents of the books or knew that the contents of the books were obscene, also violated the free speech and due process provisions of the First and Fourteenth Amendments.

Petitioner was convicted under the state obscenity statute for the sale of certain specified books when, under the standards and criteria enunciated by this Court, such conduct could not be constitutionally punished. It is submitted, with due deference, that the books involved herein are not substantially different and are in all respects comparable to the multifarious books and other writings which this Court has held to be constitutionally protected. *Redrup v. New York,* 386 U.S. 767; *Aday v. United States,* 388 U.S. 477; *Books, Inc. v. United States,* 388 U.S. 449; *Quantity of Copies of Books v. Kansas,* 388 U.S. 452; *Corinth Publications, Inc. v. Wesberry,* 388 U.S. 448; *Keney v. New York,* 388 U.S. 440; *Friedman v. New York,* 388 U.S. 441; *Mazes v. Ohio,* 388 U.S. 453; *Shepard v. New York,* 388 U.S. 444; *Avansino v. New York,* 388 U.S. 446. The books herein therefore do not, under the constitutional standards and criteria promulgated by this Court, exceed contemporary community standards, or appeal to prurient interest, and are not utterly without social importance.

The standards adopted by the court below in judging the alleged obscenity of the material arbitrarily and capriciously disregarded the constitutional tests promulgated by this Court, and it is not conducive to the true administration of justice under the fundamental law to permit the ruling to stand, it is submitted.

Under the circumstances, the petitioner has been placed in a position where he had no reason to suppose that he was violating a criminal statute which under the rulings of this Court could not be applied to him, and he plainly had no reason to believe that this Court would permit the statute to be so construed and applied as to retroactively bring his conduct within the scope of the state obscenity statute. This is clearly a case of punishment, *ex post facto,* and raises the harsh and arbitrary results which were the subject of condemnation by this Court in *Bouie v. City of Columbia,* 378 U.S. 347, and *Shuttlesworth v. City of Birmingham,* October Term, 1968, No. 42, 37 L.W. 4203. It is the same hardship, in more virulent form, so far as this retailer is concerned, as was discussed by the dissenting opinions in *Ginzburg v. United States,* 383 U.S. 463, 477-478, 493-497, 500. See also, *United States v. Ginzburg,* 398 F. 2d 52 (3 Cir. 1968).

In addition, the petitioner herein has been convicted under a construction of the state obscenity statute which permitted the jury to convict the petitioner solely upon proof of knowledge of "contents" of the material, and without any proof that the petitioner knew the alleged obscene character of the books involved. Again, such construction is directly contrary to the rulings of this Court holding that any obscenity statute which is so construed and applied as to punish a retailer, or any

other person, solely upon alleged knowledge of the contents of the material without any proof that such individual knew that the material was allegedly obscene arbitrarily results in a deprivation of liberty without due process of law and constitutes an abridgment of speech and press in violation of the First and Fourteenth Amendments. *Smith v. California,* 361 U.S. 147; *Mishkin v. New York,* 383 U.S. 502, 510-511; *Ginsberg v. New York,* 390 U.S. 629, 643-645. Thus, by the denial of the petition for a writ of certiorari herein, innocent conduct and guiltless behavior under the prior rulings of this Court have been made retroactively illegal, and a state obscenity statute which could not constitutionally be applied to this petitioner at the time the books involved were sold has now been retroactively enlarged to encompass conduct which petitioner had no reason to believe came within the purview of the statute.

In *Redrup-Austin,* 384 U.S. 916, the grant of certiorari was initially limited to the question of *scienter,* a question of substantial importance which plainly required determination by this Court. Yet the question was not answered when the decision was finally rendered, 386 U.S. 767, and all the important issues revolving around the question of *scienter* still remain unanswered by this Court. As a result, guidelines for law enforcement officials, judges, and juries in obscenity prosecutions are still unavailable, and those engaged in the publication, distribution and circulation of all media of expression, no matter how innocent, face prosecution under the multifarious state obscenity statutes.

The result of all of the aforesaid is a violation of one of the most basic principles known to the Law, to wit,

that a criminal statute must give fair warning of the conduct that it makes a crime. The failure of due process in this case is even more pronounced than the failure of due process in such cases as *DeJonge v. Oregon,* 299 U.S. 353, and *Cole v. Arkansas,* 333 U.S. 196. Where a person conducts himself in conformity with the constitutional standards and criteria enunciated by this Court, and where such innocent conduct is subjected to conviction and severe punishment, without notice that enforcement of the state statute is not subject to such standards and criteria, then conviction under such circumstances is not consistent with due process of law. "Were it otherwise, the evil would be as great as it is when the law is written in print too fine to read or in a language foreign to the community." *Lambert v. California,* 355 U.S. 225, 230.

3. As a result of this Court's denial of the petition for a writ of certiorari, the state obscenity statute has been rendered so vague, ambiguous, uncertain and overbroad as to clearly violate the free speech and press provisions of the First and Fourteenth Amendments and to raise again the First Amendment and due process questions presented in *Roth v. United States* [*Alberts v. California*], 354 U.S. 476.

Concededly, the standards and criteria enunciated by this Court in *Roth, Jacobellis, Memoirs* and *Redrup* were themselves inherently lacking in precision. Virtually every member of this Court has expressed doubt as to the precise meaning of these standards. Justice Black has stated that "no person, not even the most learned judge much less a layman, is capable of knowing in advance of an ultimate decision in his particular case by this Court whether certain material comes with-

in the area of 'obscenity' as that term is confused by this Court today." *Ginzburg v. United States,* 383 U.S. 463, 481. Justice Harlan observed: "The central development that emerges from the aftermath of Roth v. United States, 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498, is that no stable approach to the obscenity problem has yet been devised by this Court. . . ." *Memoirs v. Massachusetts,* 383 U.S. 413, 455. Justice Stewart stated: "It is possible to read the Court's opinion in Roth v. United States and Alberts v. California, 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498, in a variety of ways. In saying this, I imply no criticism of the Court, which in those cases was faced with the task of trying to define what may be indefinable. . . ." *Jacobellis v. Ohio,* 378 U.S. 184, 197. Chief Justice Warren declared: "The definition enunciated in [*Roth-Alberts*] has generated much legal speculation as well as further judicial interpretation by state and federal courts. It has also been relied upon by legislatures. Yet obscenity cases continue to come to this Court, and it becomes increasingly apparent that we must settle as well as we can the question of what constitutes 'obscenity' and the question of what standards are permissible in enforcing proscriptions against obscene matter. . . ." *Jacobellis,* 378 U.S. at 199-200. See also, Justice Douglas in *Ginzburg v. United States,* 383 U.S. at 483, Justice White in *Memoirs v. Massachusetts,* 383 U.S. 413, 461, and the *per curiam* opinion in *Redrup v. New York,* 386 U.S. 767, 770-771.

The denial of the petition for a writ of certiorari here, which permits the judgment of conviction to stand, despite the fact that the books involved are well within the protective standards and criteria heretofore enun-

ciated by this Court and despite the fact that the record is devoid of guilty knowledge on the part of this petitioner, results in a broadening of the state obscenity statute and creates not only uncertainty and confusion for law enforcement officials and citizens alike, but necessarily creates a most pervasive censorship and invasion of protected freedoms. This Court has constantly reiterated that "a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms". *NAACP v. Alabama ex rel. Flowers,* 377 U.S. 288, 307. The Court has emphasized that "precision of regulation must be the touchstone in an area so closely touching our most precious freedoms". *NAACP v. Button,* 371 U.S. 415, 438. Government, we have been told, "may regulate in the area only with narrow specificity" (*Id.,* 371 U.S. at 432-433). When one must guess what conduct or utterance may lose him constitutional protection, one necessarily will "steer far wider of the unlawful zone". *Speiser v. Randall,* 357 U.S. 513, 526.

All of these principles are undermined, it is submitted, by the denial of certiorari in the case herein, and the public's access to constitutionally protected expression is gravely endangered.

4. Petitioner recognizes that a denial of a petition for a writ of certiorari by this Court carries with it no implication whatever regarding the Court's view on the merits of a case which it has declined to review. "Pertinent considerations of judicial policy here come into play." *Maryland v. Baltimore Radio Show,* 338 U.S. 912, 918. It cannot be gainsaid however that the

effect of the denial of a writ of certiorari in this case is to affirm the judgment of conviction of this retail bookseller on standards and criteria which do not meet the requirements of the Constitution, and which result in the deprivation of liberty without due process of law and the abridgment of the exercise of freedoms of speech and press. The petitioner submits, therefore, that Justice Black was correct in his view that the petition for a writ of certiorari herein should be granted and the judgment reversed, and that, at the very least, the petition for a writ of certiorari should be granted and the case set for argument as Justice Douglas held. The questions presented are of great public importance which require determination by this court.

## Conclusion.

For the reasons set forth above and in the petition for a writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a Writ of Certiorari issue to the Appellate Department of the Superior Court of the State of California for the County of Santa Clara.

Respectfully submitted,

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